IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEmpC 159
CRC 29/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SUSAN LEE WILSON Plaintiff
AND	ABC DEVELOPMENTAL LEARNING CENTRES (NZ) LTD Defendant

Hearing:	9 December 2010 (Heard at Queenstown)
Counsel:	Mary-Jane Thomas, counsel for plaintiff Joanne Douglas, counsel for defendant
Judgment:	9 December 2010

ORAL JUDGMENT OF JUDGE A A COUCH

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[1] The defendant owns and operates an early childhood learning centre in Arrowtown. It acquired that business in June 2006. The plaintiff was then the director of the centre and was employed by the defendant to carry on in that role beginning from 26 June 2006.

[2] The plaintiff resigned in September 2009, finishing work on 13 October 2009. During the last year of her employment, a number of issues arose between the parties. Claims arising out of those issues were lodged with the Employment Relations Authority which investigated them. One claim related to annual holidays. There were also two personal grievances; one of unjustified dismissal and the other that, as a result of unjustifiable action of the defendant, the plaintiff had been disadvantaged in her employment.

[3] The Authority dismissed all of the plaintiff's claims. The plaintiff challenged that determination[1] in relation to the holidays issues and the disadvantage personal grievance. The matter proceeded before the Court as a de novo hearing on those issues.

Annual holiday claim

[4] In essence, the plaintiff claims that the defendant incorrectly regarded three periods of time in 2007 and 2008 as annual holidays and, as a result, failed to pay her holiday pay to which she was entitled when her employment ended. Those periods were in July 2007 (10 days), October 2007 (10 days), and over the Christmas/New Year period between 2007 and 2008 (11 days).

[5] Annual holidays are governed by the Holidays Act 2003. Of particular relevance to this case are ss 18 and 19:

> **18 Taking of annual holidays**
>
> (1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.
>
> ...
>
> (3) When annual holidays are to be taken by the employee is to be agreed between the employer and employee.
>
> ...
>
> **19 When employee may be required to take annual holidays**
>
> (1) An employer may require an employee to take annual holidays if—
>
> (a) the employer and employee are unable to reach agreement under section 18(3) as to when the employee will take his or her annual holidays; or
>
> (b) section 32 (which relates to closedown periods) applies.
>
> (2) If subsection (1) applies, an employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays.

[6] To be effective under s 19, any requirement by an employer must relate to a specific period of time which is to be taken as annual holidays. It was accepted by the only witness for the defendant in this case, Sharon Harris-Scoble, that no such direction was ever given to the plaintiff. The issue, therefore, is whether the parties agreed that each of the periods in question should be annual holidays.

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[1] CA127/10, 28 May 2010.

[7] The nature of the defendant's business in Arrowtown is such that children are in attendance only during the school terms. This means that there are four periods each year of what was described as "non-contact time". It is common ground that the defendant gave general agreement that the plaintiff could take annual holidays at times to suit her during non-contact time. The plaintiff, however, said that she did not elect to take annual holidays during any of the periods in question. Her position was very simply, therefore, that she had not agreed to those periods being regarded as annual holidays. She also said that she worked throughout each of them.

[8] The defendant relied on a time recording system known Kronos. This recorded data from several sources including time clocks in the defendant's premises and manual entries. During the periods in question there was no record of the plaintiff having operated the time clock at the Arrowtown centre. The defendant concluded from this that the plaintiff was not working during those periods and invited the Court to infer from this that the plaintiff elected to take those periods as annual holidays.

[9] The Kronos records for the period in question also recorded, for each day of the periods in question, the notation "normal". This was inserted by the plaintiff's immediate manager at the time, Davina Jones. The notation "normal" was understood to mean working normal hours. This aspect of the time record, therefore, supports the plaintiff's position. The plaintiff also said that Ms Jones told her not to use the time clock during these periods as she would look after the records.

[10] For the defendant, Ms Harris-Scoble said that she believed Ms Jones had made these entries in error and asked the Court to ignore them. I am not prepared to do that. Ms Jones was not called as a witness and no reason was given why she could not be called. These entries were part of a routine business record prepared by a responsible officer of the defendant company. They were also consistent with the plaintiff's evidence.

[11] I was also invited to consider an e-mail dated 25 January 2008, apparently written by Ms Jones. This mentioned paying the plaintiff incorrectly by "not taking off annual leave". Ms Douglas submitted that this should be regarded as confirmation that Ms Jones made an error in the information relevant to this case. I do not accept that submission. Read in context, the e-mail appears to be dealing with related, but

different, issues. It is also clear from an email written by the plaintiff, to which Ms Jones was replying, that they were both dealing with particular days, none of which was within any of the periods in question in this case.

[12] I find that the defendant incorrectly regarded the three periods in question as annual holidays. That is because there was no agreement that the plaintiff should take annual holidays at that time. It is also because there is reason to reject the plaintiff's evidence that she was working during those periods.

[13] The result is that the plaintiff's annual holiday entitlement at the time her employment ended should have been 31 days greater than the figure relied on by the defendant which was a negative balance of somewhere between 10 and 11 days. Taking into account some other minor issues of calculation which I need not detail, a just outcome is that the defendant be ordered to pay the plaintiff for an additional 20 days of annual holidays. Payment must be in accordance with s 24 of the Holidays Act 2003. I leave it to the parties to calculate that sum in the first instance but, should there be any difficulty in doing so, leave is reserved to apply for further directions.

The personal grievance

[14] Throughout the employment relationship there were issues about the basis on which the plaintiff was to be paid. These were heightened early in the relationship by an error on the part of the defendant in paying the plaintiff as a casual wage worker for several months although her terms of employment were that she was a permanent full-time worker on salary.

[15] Other issues arose out of differences between the plaintiff's terms of employment by the defendant and those she had enjoyed with her previous employer.

[16] Further difficulties arose out of requests by the defendant that the plaintiff provide information about when she was working and when she was on holiday during non-contact periods. Ms Harris-Scoble in particular became frustrated by what she regarded as the plaintiff's persistent failure to provide the information she asked for. This culminated in a meeting and subsequent exchange of correspondence between the plaintiff and Ms Harris-Scoble in March 2009.

[17] On 4 March 2009 Ms Harris-Scoble sent an e-mail to the plaintiff which included the following passage:

> As your Centre closes for school holidays, you are required to:
>
> 1. Work 8 hours per day at the centre if work is required and this has been approved by the Area Manager.
> 2. Use your annual leave or leave without pay for all other days not required at work
> 3. If you are not in a position to take leave without pay the options available are:
>   a. Restructure the centre to remain open all year round
>   b. Work at the Queenstown centre when staffing requirements allow for this

[18] The plaintiff replied to that e-mail in a letter dated 11 March 2009 expressing differing views on some issues and concluding: "May I suggest a mediation phone conference in the near future with myself and a support person." This prompted an immediate e-mail response from Ms Harris-Scoble which was:

> Hello sue
>
> I have read your responses to my e-mail. This was not actually required. Nor was it an invitation for discussion.
>
> Please note the following instructions. These are not for discussion.
>
> 1. Your annual salary requires you to work 48 weeks of the year, minimum 8 hours per day, and an additional 4 weeks of annual leave.
>   You are, in addition, entitled to such other leave on pay as approved, for sickness and bereavement, and for training. Such approved leave is paid for and forms part of the 48 hours worked.
>
> 2. Should your Centre be closed for holidays you are required to agree with your Area Manager the days you will work and the reasons for this, and the days the centre will be closed. During closures you are able to take annual leave or leave without pay.
>
> 3. You are required to log in to work every day and log out when you leave. If you work less than the core 8 hours in a day, you will be paid for the hours worked. If you work additional hours in a day you will be paid the maximum of 8 hours. Built into your salary is recognition for attending meetings and a few additional hours worked when required. This is a requirement of all staff whether salaried or not, including the General Manager. Your attention to this will be monitored closely and any failure to log in and out in the future may result in you not being paid.
>
> ...

[19] At the heart of the personal grievance is paragraph 2 of this e-mail which essentially re-states what is said in paragraphs 1 and 2 of the e-mail of 4 March 2009.

The inevitable implication of this correspondence is that the plaintiff could no longer choose when she was to work during non-contact times and that, if she did not work, she would not be paid unless she took annual holidays. The effect of this was to effectively compel the plaintiff to take annual holidays at the employer's direction without complying with the requirements of s 19 of the Holidays Act. It also created the prospect that, if the area manager did not agree to allow the plaintiff to work and she had no accrued annual holiday entitlement, she would not be paid at all.

[20] I find the imposition of these conditions was fundamentally inconsistent with the individual employment agreement between the parties which was for full-time permanent employment. This was inappropriate and unjustifiable action on the part of the defendant which affected the plaintiff's employment to her disadvantage. As things turned out, the possible consequences of these conditions never occurred. Shortly after this correspondence was exchanged, the plaintiff suffered an injury and was on accident compensation for the remainder of her employment by the defendant.

[21] The plaintiff gave evidence of distress as a result of this correspondence and the imposition of these conditions. In all the circumstances I award her compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 of $1,500.

Conclusion

[22] In summary:

a) The plaintiff's challenge succeeds.

b) The defendant is ordered to pay the plaintiff for 20 days' annual holidays in accordance with s 24 of the Holidays Act 2003. Leave is reserved to seek further directions if the parties are unable to agree the amount payable.

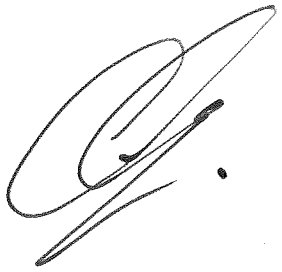
c) The plaintiff's personal grievance is sustained.

d) The defendant is ordered to pay the plaintiff $1,500 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000

e) By operation of s 183(2) of the Employment Relations Act 2000, the determination of the Authority is set aside and this decision stands in its place.

Costs

[23] Costs are reserved. I urge the parties to agree costs if at all possible. Otherwise, Ms Thomas is to submit a memorandum within 15 working days after today. Ms Douglas is then to have 10 working days in which to respond.



AA Couch
Judge

Judgment delivered orally at 5.04 pm on Thursday 9 December 2010